HOME TELEPHONE
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APPEAL FROM THE CIRC
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No. 173. Argued Octob

Only the legislature of a
ized thereto by the legi
mental power such as fi
To grant a corporation the

NE AND TELEGRAPH COMPANY *v.* Y OF LOS ANGELES.

IRCUIT COURT OF THE UNITED STATES FOR HERN DISTRICT OF CALIFORNIA.

tober 21, 1908.—Decided November 30, 1908.

a State, or a municipality specifically authorized egislature, can surrender by contract a governs fixing rates.

the right to charge a specified rate for a specified

Walla Walla v. *Water Co.*, 172 U. S. 1, 15; *Central Trust Co.* v. *Citizens' Ry. Co.*, 82 Fed. Rep. 1, 8; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587; *Danville Water Co.* v. *Danville*, 180 U. S. 619; *Atlantic & Pacific R. R. Co.* v. *United States*, 76 Fed. Rep. 186.

The regulating ordinance does not contravene any of the provisions of the Constitution of the United States. *San Diego Water Co.* v. *San Diego*, 118 California, 556; *Moore* v. *Haddonfield*, 62 N. J. Law, 386; *Cleveland, C. C. & St. L. R. R. Co.* v. *St. Bernard*, 19 Ohio C. C. Rep. 299; *Water Works* v. *San Francisco*, 82 California, 286, 315; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 600; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 168; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Chicago &c. Ry. Co.* v. *Minnesota*, 134 U. S. 418; *San Diego Land Co.* v. *National City*, 174 U. S. 739, 748.

MR. JUSTICE MOODY delivered the opinion of the court.

This is a suit in equity brought in the Circuit Court of the United States by the appellant, a telephone company, against the city of Los Angeles, and its officers. The object of the suit is to restrain the enforcement of certain ordinances which fixed the rates to be charged for telephone service; required every person, firm or corporation supplying telephone service to furnish annually to the city council a statement of the revenue from, and expenditures in, the business, and an itemized inventory of the property used in the business, with its cost and value; and provided a penalty for charges in excess of the rates fixed and for failure to furnish the required statements. The defendants demurred to the bill, the demurrer was sustained, and an appeal was taken directly to this court on the constitutional questions, which will be stated.

The ordinances complained of were enacted by virtue of the powers contained in § 31 of the city charter, which is as follows:

"(Sec. 31.) The Council shall have power, by ordinance, to regulate and provide for lighting of streets, laying down gas pipes and erection of lamp posts, electric towers and other apparatus, and to regulate the sale and use of gas and electric

light, and fix and determine the price of gas and electric light, and the rent of gas meters within the city, and regulate the inspection thereof, and to regulate telephone service, and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service, and connections; and to prohibit or regulate the erection of poles for telegraph, telephone or electric wire in the public grounds, streets or alleys, and the placing of wire thereon; and to require the removal from the public grounds, streets or alleys of any or all such poles, and the removal and placing under ground of any or all telegraph, telephone or electric wires."

It was decided by the judge of the court below, and is agreed by the parties, that this section of the charter conferred upon the city council, in conformity with the constitution and laws of the State of California, the power to prescribe charges for telephone service. Not doubting the correctness of this view, we accept it without extended discussion. The power to fix, subject to constitutional limits, the charges of such a business as the furnishing to the public of telephone service is among the powers of government, is legislative in its character, continuing in its nature, and capable of being vested in a municipal corporation.

The company, however, insists that the city, having the authority so to do, has contracted with it that it may maintain the charges for service at a specified standard, and that as the rates prescribed in the ordinances complained of are less than that standard, the ordinances therefore impair the obligation of the contract, in violation of the Constitution of the United States. This is the first question to be considered, and the facts out of which the contention arises are alleged in the bill and admitted by the demurrer.

The company obtained its franchise under the provisions of a statute of the State enacted March 11, 1901 (Stats. 1901, p. 265[1]), which was later than the adoption of § 31 of the city charter. This statute provides that, among other franchises,

[1] Known, and referred to in the brief, as the Broughton Act.

the franchise "to erect or lay telephone wires . . . u
any public street or highway" shall be granted by munic
corporations only upon the conditions prescribed in the
The conditions enumerated are, that an application for
franchise shall be filed with the governing body of the mu
pality, of which advertisement, in the discretion of the
council, shall be made; that the advertisement must desc
the character of the franchise to be granted and state tha
will be sold to the highest bidder, who must pay annually to
municipality, after five years, two per cent of the gross an
receipts of the business; that the franchise shall be struck
to the highest bidder; and that a bond must be given by
purchaser to secure the performance of "every term and
dition" of the franchise. There are other provisions not
terial here. By proceedings conforming to this statute a f
chise to construct and operate a telephone system for
years was sold to M. Adrian King, which, by assignment,
sented to by the city, came into the hands of the plaintiff c
pany, which constructed the works and has since opera
them. The franchise was granted by an ordinance. In
view we take of the case we need do no more than state
briefly the main features of the ordinance. It grants a franc
for fifty years, which is to be enjoyed in accordance with te
and conditions named, stipulates for certain free service
the city, and the payment to it, after five years, of two per
of the gross receipts, and provides that the charges for ser
shall not exceed specified amounts.

This ordinance, enacted by the city council, which exerc
the legislative and business powers of the city, and, as
been shown, the charter power of regulating telephone ser
and of fixing the charges, contains, it is contended, the
tract whose obligation the subsequent ordinances fixing lo
rates, impaired. Two questions obviously arise here. Did
city council have the power to enter into a contract fixi
unalterably, during the term of the franchise, charges for t
phone service and disabling itself from exercising the cha

power of regulation? If so, was such a contract in fact made? The first of these two questions calls for earlier consideration, for it is needless to consider whether a contract in fact was made until it is determined whether the authority to make the contract was vested in the city. The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the State) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the State are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further upon this point.

It has been settled by this court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 382; *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S. 496, 508. But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power. *Providence Bank* v. *Billings*, 4 Pet. 514, 561; *Railroad Commission Cases*, 116 U. S. 307, 325; *Vicksburg &c. Railroad Co.* v. *Dennis*, 116 U. S. 665; *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, 599, 611; *Stanislaus County* v. *San Joaquin C. & I. Co.*, 192 U. S. 201, 211; *Metropolitan Street Ry. Co.* v. *New York*, 199 U. S. 1. And see *Water, Light & Gas*

Co. v. *Hutchinson*, 207 U. S. 385. It is obvious that no c unless it is identical in its facts, can serve as a controlling pr dent for another, for differences, slight in themselves, r through their relation with other facts, turn the balance way or the other. Illustrations of the truth of this ma found in the cases of *Freeport Water Co.* v. *Freeport City*, *su Rogers Park Water Co.* v. *Fergus*, 180 U. S. 624, and *Knox Water Co.* v. *Knoxville*, 189 U. S. 434, where no authorized tract was found, as contrasted with *Detroit* v. *Detroit Citi St. Ry. Co.*, *supra*, and *Cleveland* v. *Cleveland City Ry.* 194 U. S. 517, where a contrary conclusion was reached.

The facts in this case which seem to us material upon questions of the authority of the city to contract for rat be maintained during the term of the franchise are as lows: The charter gave to the council the power "by nance . . . to regulate telephone service and the us telephones within the city, . . . and to fix and deter the charges for telephones and telephone service and con tions." This is an ample authority to exercise the governm tal power of regulating charges, but it is no authority to e into a contract to abandon the governmental power it It speaks in words appropriate to describe the authorit exercise the governmental power, but entirely unfitted to scribe the authority to contract. It authorizes command, not agreement. Doubtless, an agreement as to rates migh authorized by the legislature to be made by ordinance. the ordinance here described was not an ordinance to a upon the charges, but an ordinance "to fix and determine charges." It authorizes the exercise of the governme power and nothing else. We find no other provision in charter which by any possibility can be held to authori contract upon this important and vital subject. Those re on for that purpose are printed in the margin.[1]

[1] Section 2. (Article I.)

* * * * * * * *

"(12.) To manage, control, sell, lease, or otherwise dispose of

This being the condition of the charter powers, the act of 1901, under which the company derived its franchise, was passed. The first section of that act provided that franchises "shall be granted upon the conditions in this act provided *and not otherwise*." Here is an emphatic caution against reading

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or all the property of the said corporation; and to appropriate the income or proceeds thereof to the use of the said corporation; provided that it shall have no power to mortgage or hypothecate its property for any purpose."

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"(17.) To provide and maintain a proper and efficient fire department, and make and adopt such measures, rules and regulations for the prevention and extinguishment of fires, and for the preservation of property endangered thereby, as may be deemed expedient."

* * * * * * * *

"(22.) To make and enforce within its limits such local, police, sanitary and other regulations as are not in conflict with general laws and are deemed expedient to maintain the public peace, protect property, promote the public morals and to preserve the health of its inhabitants."

"(23.) To exercise all municipal powers necessary to the complete and efficient management and control of the municipal property, and for the efficient administration of the municipal government, whether such powers be expressly enumerated herein or not, except such powers as are forbidden or are controlled by general law."

"(24.) The powers conferred by this article shall be exercised by ordinance, except as hereinafter provided."

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"(Section 12, Article III.) All legislative power of the city is vested in the Council, subject to the power of veto and approval by the Mayor, as hereinafter given, and shall be exercised by ordinance; other action of the Council may be by order upon motion."

"(Sec. 16.) Six members of the Council shall constitute a quorum for the transaction of business, but no ordinance shall be passed or other act done granting a franchise, making any contract, auditing any bill, ordering any work to be done, or supplies to be furnished, disposing of or leasing the city property, ordering any assessment for street improvement, or building sewers, or any other act to be done involving the payment of money, or the incurring of debt by the city, unless two-thirds of the members of the whole Council vote in favor

into the act any conditions which are not clearly exp
in the act itself. In view of this language it cannot be su
that the legislature intended that so significant and imp
an authority as that of contracting away a power of reg
conferred by the charter should be inferred from the act
absence of a grant in express words. But there is no such
The argument of the appellant that the authority was g
is based upon the provisions of the act that an applicat
the franchise must be filed, and, in the discretion of the
cil, published; that the publication must state "the cha
of the franchise;" that the city is entitled to a percentage
receipts; that the grantee must give bond to perform
term and condition of such franchise;" that no conditio
be inserted which restricts competition or favors one
against another; and that the franchise must be sold
highest bidder. It is urged that though authority to co
for the maintenance of rates is not expressed in the ac
necessarily implied from these provisions. But we are
opinion that there is no such necessary implication,
anything less than a clear and affirmative expression wo
sufficient foundation upon which to rest an authority
nature. The decisions of this court, upon which the ap
relies, where a contract of this kind was found and en
all show unmistakably legislative authority to enter in
contract. In *Los Angeles* v. *Los Angeles City Water C*
U. S. 558, the contract was in specific terms ratified an
firmed by the legislature. In *Detroit* v. *Detroit Citize*
Ry. Co., 184 U. S. 368, the contract was made in obedi
an act of the legislature that the rates should be "estal
by agreement between said company and the corpora
thorities." The opinion of the court, after saying (p

thereof. All other ordinances may be passed by a vote of a m
of the whole Council."

"(Sec. 33.) It shall, by ordinance, provide for maintaining
alarm and police telegraph system, and for the cleaning and sp
of graded and accepted streets."

"It may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinance in question, including rates of fare," pointed out (p. 386) that "it was made matter of agreement by the express command of the legislature." In *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 517, the legislative authority conferred upon the municipality was described in the opinion of the court (p. 534) as "comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated." In *Cleveland* v. *Cleveland Electric Ry.*, 201 U. S. 529, precisely the same authority appeared. In *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S. 496, the court said (p. 508): "The grant of legislative power upon its face is unrestricted, and authorizes the 'city to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks.'" Moreover, in this case the construction of the Supreme Court of Mississippi of its own statutes was followed. On the other hand, it was held in *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, that two acts of the legislature passed on successive days, authorizing municipalities to "contract for a supply of water for public use for a period not exceeding thirty years," and to authorize private persons to construct waterworks "and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years," did not confer an authority upon the municipality to contract that the water company should be exempt from the exercise of the governmental power to regulate rates. In this case, too, the construction of the highest court of the State was followed. See *Rogers Park Water Co.* v. *Fergus*, 180 U. S. 624. All these cases agree that the legislative authority to the municipality to make the contract must clearly and unmistakably appear. It does not so appear in the case at bar. The appellant has failed to show that the city had legislative authority to make

a contract of exemption from the exercise of the power
ulation conferred in the charter. It therefore becomes
essary to consider whether such a contract in fact was
The appellant's contention, that there was a violation
obligation of its contract, must therefore be denied.

The appellant also contends that the ordinances fixing
are wanting in due process of law, and therefore viola
Fourteenth Amendment of the Constitution of the
States, because the section (31) of the charter, under
authority they were enacted, does not expressly provi
notice and hearing before action. But rate regulation is
a legislative function and, even where exercised by a su
nate body upon which it is conferred, the notice and h
essential in judicial proceedings and, for peculiar reas
some forms of taxation (see *Londoner* v. *Denver*, 210 U. S
would not seem to be indispensable. It may be that t
thority to regulate rates, conferred upon the city coun
§ 31 of the charter, is not an authority, arbitrarily, and
out investigation, to fix rates of charges, and that if c
were fixed in that manner the act would be beyond t
thority of the council. It is not unlikely that the Cali
courts would give this construction to the ordinance.
Diego Water Co. v. *San Diego*, 118 California, 556.
within the authority thus limited it would seem that the
acter and extent of the investigation made and notic
hearing afforded, in the exercise of this legislative fun
would be left to the discretion of the body exercising
must not be forgotten that, presumably, the courts
States, and certainly the courts of the United States, ar
to those who complain that their property has been confi
by an act of regulation of this kind, and that the latter
will, under all circumstances, determine for themselves wh
such confiscation exists. But we need not now decide wh
notice and hearing were required. Both were given i
case. An ordinance of the city provided that the rates
be fixed at a regular and special meeting of the city c

held during the month of February of each year, and another ordinance, as has been shown, required the telephone company to render annually, in the month of February, to the city council a statement of its receipts, expenditures and property employed in the business, facts which would be material on the question of fixing reasonable rates. This shows that a sufficient notice and hearing were afforded to the appellant, if it had chosen to avail itself of them, instead of declining to furnish all information, as it did. If notice and an opportunity to be heard were indispensable, which we do not decide, it is enough that, although the charter be silent, such notice and hearing were afforded by ordinance, as in this case. So, it was held in *Paulsen* v. *Portland*, 149 U. S. 30, 38, and it was held in *San Diego Land Company* v. *National City*, 174 U. S. 739, that the kind of notice and hearing (in that case provided by statute) which the ordinance in this case afforded was sufficient. For these reasons the contention of the appellant on this part of the case is denied.

We do not understand that an objection to the ordinance requiring the statement of the appellant's receipts, expenditures and property is made, except in so far as it is a step in the rate-making process. If a further objection is made we see nothing in it. See *San Diego Land Co.* v. *National City*, *supra*.

The appellant further insists that the city council is not an impartial tribunal, because, in effect, it is a judge in its own case. It is too late, however, after the many decisions of this court, which have either decided or recognized that the governing body of a city may be authorized to exercise the rate-making function, to ask for a reconsideration of that proposition. In this connection the appellant calls attention to the fact that by the charter of the city twenty-five per cent of the electors may recall a member of the council and require him again to stand for election. Nevertheless, he takes part in the rate-making function under his personal responsibility as an officer, and it cannot be presumed, as matter of law, that the

keener sense of dependence upon the will of the people, which this feature of his tenure of office brings to him, will distort his judgment and sense of justice. It would be conceivable, of course, that the members of the legislature themselves might be subjected to the same process of recall, but it hardly would be contended that that fact would lessen the legislative power vested in them by the constitution and laws of the State. The charter of the city also contains a provision that upon petition of fifteen per cent of the voters of the city any ordinance proposed must be submitted to the people and may be by them adopted. It is said, therefore, that the power of rate regulation might be, in this manner, exercised directly by the electorate at large. It may well be doubted whether such a result was contemplated by the legislature. There are certainly grave objections to the exercise of such a power, requiring a careful and minute investigation of facts and figures, by the general body of the people, however intelligent and right-minded. But the ordinance was not adopted in this manner in this case, and it will be time enough for the courts of the States and of the United States to consider, when that is done, whether the objections only go to the expediency of such a method of regulation or reach deeper and affect its constitutionality.

Passing the questions of power, the appellant contends that it was denied the equal protection of the laws, because, contemporaneously with the fixing of rates for it, different rates were fixed for another telephone company doing business within the city. The only information we have on the subject is in the allegations of the bill, that a competitor of the complainant engaged in like business was allowed to charge for telephone service sums greatly in excess of those prescribed by the ordinance, and that these rates discriminated against the complainant and deprived it of the equal protection of the laws. An important question is thus suggested, but we think the allegations are so vague that we cannot pass upon it. Whether the two companies operated in the same territory,

or afforded equal facilities for communication, or rendered the same services does not appear. For aught that appears, the other company may have brought its patrons into communication with a very much larger number of persons, dwelling in a much more widely extended territory, and rendered very much more valuable services. In other words, a just ground for classification may have existed. Every presumption should be indulged in favor of the constitutionality of the legislation. In *Sweet* v. *Rechel*, 159 U. S. 380, 392, it was said: "But in determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the Constitution. It is a well settled rule of constitutional exposition that if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed."

It is to be taken into account in considering this, as well as other questions, that the appellant has declined to furnish to the council facts within its knowledge which would enable the council to exercise their powers intelligently and justly, and that there is no suggestion in the case at bar that the rates actually fixed were so low as to operate as a practical confiscation of property.

For the foregoing reasons we are of the opinion that the action of the court below in sustaining the demurrer was correct, and the decree is

Affirmed.